Western Europe: G. The Netherlands

de Graaf, K.J.; Tolsma, H.D.

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(1) Introduction

The most interesting development in the Netherlands this year was foreseen in the report on 2014. The reasoning in, and consequences of, the *Urgenda Foundation v The State of the Netherlands* decision (*Urgenda* decision), will be discussed below. This now world famous judgment of the Dutch district court in The Hague has rightfully received much attention for being the first judgment that orders a state to do more against climate change. Although international environmental law has had its relevance for many of the developments in environmental law in the Netherlands, no new international environmental law treaty was published in the Bulletin of Treaties of the Kingdom of the Netherlands as no new treaties were ratified in 2015. It is therefore not surprising that most of the attention of environmental lawyers and academics in the Netherlands was drawn towards national (legislative) developments and European law. This report provides information on the ongoing process of restructuring environmental law in the Netherlands, the implementation of the Energy Agreement on Sustainable Growth of 2013, and the ongoing debate about onshore natural

gas production in the north of the Netherlands). In addition, we discuss the environmental problems on the island of Curaçao caused by the Isla refinery.

(2) The *Urgenda* Decision

In last year's country report on the Netherlands, we dedicated a section to the civil lawsuit brought to court by Urgenda, a non-governmental organization dedicated to accelerating the transition towards a sustainable society. Judgment was expected in 2015. In the lawsuit, Urgenda demanded that the court, together with concerned citizens, order the state to do more in order to reduce carbon dioxide emissions in the Netherlands. On 24 June 2015, the District Court of The Hague decided, in a landmark ruling, that the current Dutch policy to reduce carbon dioxide emissions is not sufficient to prevent dangerous climate change and that the Netherlands is therefore liable. The court substantially granted the relief claimed by Urgenda and others. It ordered the state to reduce the greenhouse gas emissions in the Netherlands by at least 25 percent by the end of 2020. The state is therefore obliged to intensify its actions to combat climate change (see discussion later in this report). Other claims were denied, such as a declaratory relief regarding scientific facts, an acknowledgement of the Netherlands' role in climate change, and the claim that the current government would be acting illegally if it were to fail to bring into effect a reduction of at least 25 percent by 2020 and 40 percent by 2030. The judgment itself, as well as the documents of the lawsuit, has been translated into English in order to allow an international audience to take notice (see Doc. ECLI:NL:RBDHA:2015:7196 <http://www.rechtspraak.nl>). This rarely happens in the Netherlands and is a clear sign that rightfully suggests the importance of the judgment.

The *Urgenda* decision provides the first global success in a case where tort-based law was used against states to combat climate change. '"Unexpected," "spectacular," "surprising," and "unprecedented" are only some of the words used to describe the landmark ruling of the District Court in The Hague (Civil Section) on the 24th of June 2015' (see K.J. de Graaf and J.H. Jans, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change' (2015) 27 Journal of Environmental Law 517). Therefore, it could possibly provide a relevant precedent for other legal systems (see S. Roy and E. Woerdman, 'Situating Urgenda Versus the Netherlands within Comparative Climate Change Law' (2016) 34 Journal of Energy and Natural Resources Law (forthcoming)).

The judgment has received much attention from the press all over the world. Lawyers and legal scholars in the Netherlands also discussed the judgment in numerous publications dedicated specifically to the reasoning of the court and the consequences of the judgment. Many issues trigger important legal discussion and debate. There are questions about causation (between future damage

and the emissions reduction policy in the Netherlands). There is a very relevant argument that the state should be awarded a (very) large discretion in trying to combat climate change and that the courts should be very reluctant to order the state to act. In general, there is a question as to what extent courts are allowed to order the legislator to legislate or whether the courts should respect the discretion of the state. This country report, however, is not the place to provide an in-depth overview of the legal relevance of the judgment.

One important aspect of the *Urgenda* decision for this report is the question of whether Urgenda and the citizens of the Netherlands could indeed base their claim on the fact that the Dutch state violated international (environmental) law. In that respect, the court deals with a lot of important international agreements and treaties concerned with mitigating climate change in its judgment, such as the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol to the UNFCCC. The court rules that the binding force of relevant international environmental law usually relates only to obligations between states. Even if the Netherlands failed to meet one of its international obligations, this would not imply that it was acting unlawfully towards Urgenda or the Dutch citizens. According to Dutch law, this would be different in cases where citizens can derive a right from a specific written or unwritten rule of international law. That is the case if the relevant provisions of the treaties or resolutions are considered to be binding on all persons (Articles 93 and 94 of the Constitution of the Kingdom of the Netherlands). However, the court understandably ruled that it could not find any such relevant content in the relevant international treaties. The court therefore established that Urgenda could derive no legal obligation of the state towards it from international (or European) law. Therefore, the question of whether the actions of the Netherlands were in fact in breach of the standard of due care mentioned in Article 162 of Book 6 of the Civil Code of the Netherlands was relevant. A doctrinal challenge for the court was how to establish the actual scope of the duty of care of the Netherlands towards Urgenda as a matter of Dutch law. The court used the international agreements and other documents to interpret the scope of the state's duty towards Urgenda. Using international agreements to establish the unwritten standard of due care of the state is not unheard of. It is, however, somewhat remarkable as agreements between states are transformed by the reasoning of the court into binding obligations of the state in relation to Urgenda by interpreting the standard of due care.

This way of reasoning by the court could be considered relevant for the implementation of international environmental law. However, it is also one of the important grounds for the appeal that was lodged by the state against the Urgenda decision in 2016. Nevertheless, the government has stated that it seeks to commence implementation of the judgment.

(3) Developments on the Energy Agreement for Sustainable Growth (Energy Agreement)

The court's order in the *Urgenda* decision, the binding new obligations that were agreed upon at the twenty-first Conference of the Parties (COP-21) of the UNFCCC in Paris in December, and the continuing efforts of the Netherlands to implement and further develop the 2013 Energy Agreement (see last year's country report) have all raised awareness in the Netherlands for the need to avoid dangerous climate change. The policy in the Netherlands is focused on limiting global warming to well below 2 degrees Celsius, but some fear that the Netherlands will not be able to make the relevant targets set by itself and the European Union (EU). The key issue in the Netherlands remains—as was discussed in the last year's country report—the development of large-scale wind farms at sea and on land in order to stimulate renewable energy production. In 2015, the Netherlands implemented a new regulatory regime for choosing suitable sites for offshore wind farms, for granting permits for construction within a reasonable time, and to offer legal certainty to investors about the subsidies for offshore wind farms (*Wet windenergie op zee* (*Official Government Gazette*) 2015, 261). One of the remaining struggles is the question relating to the new transmission system at sea for connecting the wind farms to the electricity grid onshore. The Netherlands wants the transmission system operator (TenneT) to be the operator of the new system. This requires amending existing legislation. Although the House of Representatives already approved the proposed act, on 22 December 2015, the Senate refused to adopt the legislative proposal. This has caused delays in the development of wind energy at sea (once again). Developing and implementing large wind farms on land has also been a struggle, mostly because of the resistance of local individuals (and government bodies).

Developing and stimulating wind energy production capacity, however, is not aimed at reducing direct emissions of carbon dioxide in the Netherlands. The *Urgenda* decision and the Paris Agreement, however, have mandatory reduction targets that force the Dutch state to act. One idea to give effect to the *Urgenda* decision, and—at the same time—allow for a good opportunity to be able to meet the targets of COP-21, is to try and phase out or directly close the coal-fired power plants in the Netherlands. In 2013, the Energy Agreement already entailed closing five coal-fired power plants that were built in the 1980s and 1990s. Implementing new efficiency standards based on environmental regulation has led to the permanent closure of three plants that were built in the 1980s on 1 January 2016. Two more are expected to close in the summer of 2017 when even higher efficiency standards will come into effect. In light of the *Urgenda* decision, the House of Representatives has adopted a motion that orders the government to avoid new coal-fired power plants from being built and to investigate with the owners of the newest plants the conditions and terms for closing all remaining coal-fired plants.

(4) Restructuring Environmental Legislation

Over the last few years, the restructuring of environmental law has been an ongoing topic in the Netherlands. In our previous reports for this yearbook, we provided information on the enormous legislative project that will fundamentally change the structure of Dutch environmental law: the Environment and Planning Act (EPA or, in Dutch, Omgevingswet). We also discussed the legislative proposal for a new Nature Conservancy Act (Natuurbeschermingswet). There are a few developments in the legislative process of both acts that are worth mentioning in this year's country report. On 1 July, the House of Representatives, with the support of a large majority, adopted the legislative proposal of the EPA. Next, the proposal was submitted to the Senate and was adopted on 22 March 2016. From an international environmental law perspective, it is noteworthy that Article 1.3 of the EPA does stipulate that competences and instruments in the EPA are awarded with the purpose of sustainable development. In 2015, at least two amendments were adopted by the House of Representatives that refer to internationally acclaimed principles of environmental law. One dictates that public authorities are obliged to take into account the precautionary principle and the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at the source, and that the polluter should pay, when creating a policy document on the environment (Article 3.3 of the EPA). The other demands that government refer to the same principles when it states reasons for new general binding rules based on the EPA (Article 23.6 EPA). Although the adopted act was published in the *Bulletin of Acts and Decrees of the Kingdom of the Netherlands* (*Official Government Gazette* 2016, 156), it has not yet entered into force.

Prior to the EPA entering into force, it is necessary to adopt an implementation act and an implementation decree that will amend existing legislation to align with the new act. In addition, the government is currently working on clustering and streamlining 120 existing governmental decrees into three new governmental decrees that will be based on the EPA. The three decrees will be: the Environment and Planning Decree (general and procedural provisions), the Physical Environment Quality Standards Decree (practical rules, standards and administrative instructions), and the Physical Environment Activities Decree (general binding rules with direct effect concerning activities in the environment). An online public consultation of these governmental decrees is planned for the summer of 2016. If all goes according to the (current) timetable of the government, the EPA will enter into force in 2018. Even though the adoption of the EPA by Parliament in 2015 is an important step, the fundamental reform of Dutch environmental law is still expected to be a long process.

In 2015, the legislative proposal for the Nature Conservation Act was adopted by Parliament (1 July by the House of Representatives and 15 December by the Dutch Senate). Most likely this new piece of legislation will enter into force on 1

January 2017. The intention is that nature conservation legislation will eventually merge into the EPA. One might wonder why the government decided to reform nature conservation law in a legislative process parallel to the EPA. The reason is that the government was initially of the opinion that the reform of nature conservation law was urgent, so it could not wait on the EPA. It turns out that both legislative projects run almost concurrently. Therefore, parts of the Nature Conservation Act that will be entirely integrated in the EPA might only exist for a limited time. However, in the future, those working with the legislation in practice should hardly notice the transition from the Nature Conservation Act to the EPA because there has been an optimal co-ordination between the legislative projects (for example, in regard to the use of concepts and proceedings).

(5) Earthquakes Caused by Onshore Natural Gas Production

In the country report on 2014, we discussed the earthquakes in the northern part of the Netherlands caused by onshore natural gas production. The extraction of gas from the Groningen gas field is still necessary to guarantee the supply of gas to households, institutions, and small industry. However, much resistance has arisen among the inhabitants of the area. The local population has had to deal with serious damage to their houses, and they have to live with the risk of more earthquakes, making them feel unsafe in their own homes.

A production plan requires approval from the minister of economic affairs (Article 34 of the Mining Act). On 30 January, the minister approved the production plan submitted by the Nederlandse Aardolie Maatschappij to exploit natural gas from the Groningen gas field in the gas year 2015–16. A large number of residents and local authorities appealed to the Administrative Jurisdiction Division of the Council of State because they felt their interests had not sufficiently been weighed in the decision. This highest court annulled the decision of the minister of economic affairs on 18 November (Doc. ECLI:NL:RVS:2015:3578). The reasons stated by the minister for the result of his efforts to balance all interests involved were deemed inadequate. The court ruled that given the nature and the scale of the natural gas extraction, Article 2 (right to life), Article 8 (right to respect for private and family life) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and Article 1 of the First Protocol of the ECHR (right to property) are applicable.

As a result of the annulment, the minister has to take a new decision on the approval of the production plan. The minister, furthermore, should assess whether the protection of these fundamental rights should lead to further restrictions on gas extraction. The decision has to demonstrate a reasonable balance between the interest of citizens protected by fundamental rights and the general interest. Although the minister has a large margin of appreciation in this case, the court underlines that because of the applicability of fundamental rights there

are high demands on the reasons stated for the decision. In anticipation of the new decision, the court ruled—as a provisional remedy—that extraction of natural gas is limited to a maximum of 27 billion normal cubic metres for the year 2015–16 instead of the original 33 billion normal cubic metres. This maximum corresponds with a level of production that will allow for security of supply. By the end of 2015, it became clear that the minister would, in fact, not make a new decision about the production plan for gas extraction, thereby allowing the court's provisional remedy to last the remainder of the year. For the year 2016–17, there will be a new production plan in need of approval by the minister, and there will most likely be—when it is in fact given—appeals against it.

(6) Isla Refinery of Curaçao

Curaçao, located in the Caribbean and a former colony of the Netherlands, is one of the four countries of the Kingdom of the Netherlands. On the island of Curaçao, the so-called Isla refinery has been causing environmental damage and problems such as odour, noise, and light pollution and especially the emission of a green substance that attaches to walls, fences, air conditioners, cars, boats, and other objects and is suspected of being highly harmful to human health. The refinery was sold in 1985 by Royal Dutch Shell to the government of the island for the symbolic sum of one Dutch guilder. Since then, the refinery has been rented to Petróleos de Venezuela SA, an oil company owned by the republic of Venezuela.

The Foundation for a Clean Environment on Curaçao has acted for years against the nuisance. Proceedings aimed at enforcing environmental permits did not lead to any results. Increased pollution from the Isla refinery in 2015 gave rise to the start of a civil proceeding against the country of Curaçao. The plaintiffs believe that the government is acting unlawfully by failing to take action against the emergency created by the Isla refinery. They state that, based on national and international standards, the government is obliged to protect people against life-threatening health risks. The request of the foundation, along with that of the residents, briefly aimed at giving an order to investigate the effects on the environment and health and to report within a certain period of time, all subject to a penalty. The Court of First Instance of Curaçao rejected all of the requests (Gerecht in eerste aanleg van Curaçao, 16 November 2015, zaaknr, Doc. KG 74136/2015, *SMOC CAE et al. v Land Curaçao*). The judgment received criticism from scholars (see the Frielink and Rogier, 'Case Note' (2016) 5(1) Caribisch Juristenblad 44). It is very striking that, for example, the explicit appeal to fundamental rights is not mentioned at all by the court. According to the applicants, there is an infringement of Article 2 (right to life), Article 8 (right to respect for private and family life), and Article 10 (right to receive information) of the ECHR.

The question arises as to whether or not the Dutch state should interfere and take action in order to stop the violation of these fundamental rights. The legal relations between the countries within the kingdom is regulated by the Charter for the Kingdom of the Netherlands. A legal basis for the Netherlands to act in this dispute can be found in Article 43 of this charter. This provision reads as follows:

(1) Each of the Countries shall promote the realization of fundamental human rights and freedoms, legal certainty and good governance.
(2) The safeguarding of such rights and freedoms, legal certainty and good governance shall be a Kingdom affair.

In February 2016, the House of Representatives of the Netherlands passed a motion that expressed its opinion that there is a case of improper administration by the authorities on Curaçao because those authorities do not enforce the current emissions standards. In addition, the motion states that this constitutes a violation of the fundamental rights of citizens on the island, whose lives are endangered. The House of Representatives requests that the Dutch government consult with the government of Curaçao and ask it urgently to take all reasonable measures to reduce emissions within a maximum of three months. However, the foundation for a Clean Environment on Curaçao has no confidence in this soft approach and has brought the case to the European Court of Human Rights. The foundation is of the opinion that only a serious stimulus can bring change. This means it wants the government to impose a large fine and also to consider closing the Isla refinery or, at least, investigate that possibility. Therefore, the foundation requests that the Kingdom of the Netherlands be ordered by the court to fulfil its duty to closely supervise the government of Curaçao (based on Article 56 of the ECHR) and enforce the globally applied environmental standards when possible and abandon the (outdated) standards established in Curaçao.

Kars de Graaf and Hanna Tolsma
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